

DOWNGRADING SUPERPRECEDENTS

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I. INTRODUCTION

It is widely believed that some judicial cases should qualify as superprecedents.¹ This Article considers the idea of a judicial superprecedent² at the level of broad legal theory,³ as well as at the level of the particular superprecedent cases themselves.⁴ As it turns out, the apparently reasonably clear idea of a superprecedent is actually remarkably unclear in a variety of often conflicting ways.⁵ Beyond the definitional conflicts, however, lie what we might

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¹ For the range of proposed theories of a judicial superprecedent, and some commonly proposed superprecedent cases, see *infra* Part II. Whether there are, along with possible superprecedents and ordinary precedents, what we might call “infraprecedents,” or distinctively weak precedents, is a separate issue.

² See *infra* Part II.

³ See *infra* Part II.

⁴ See *infra* Part II.

⁵ See *infra* Part II. Merely for one initial example, consider whether a case that has largely withstood many challenges from many quarters over time, as perhaps in the case of *Roe v. Wade*, 410 U.S. 113 (1973), can qualify as a superprecedent. Or must the case have not been subject to recent serious challenges at any level, as perhaps in the case of *Martin v. Hunter’s Lessee*, 14 U.S.

call the paradoxes of superprecedence, with these paradoxes themselves taking various forms.⁶ These paradoxes of superprecedence take our understanding of the idea of a precedent in surprising directions. And then in turn, beyond these paradoxes of superprecedence, are a range of unresolved important problems plaguing the very idea of a judicial superprecedent.

The latter problems begin, first, with the familiar understanding of a superprecedent as somehow a “foundational” or “bedrock” case. This metaphor may seem apt and even uncontroversial. But as it turns out, the metaphor of a superprecedent’s foundational or bedrock status is as importantly misleading as it is otherwise helpful.⁷ And then secondly, there is the crucial problem of whether the idea of a superprecedent is, or should be, primarily descriptive; is instead already primarily normative or evaluative in character; or else is some interesting hybrid of both of these distinct approaches.⁸ Third, and finally, there is the problem of the sheer range and variety of the possible critical responses to any current judicial superprecedent.⁹ What sorts of judicial or legislative treatments of a case are compatible with that case’s retaining its superprecedent status? This is a further important question that has been left widely under-discussed.

Ultimately, this Article concludes¹⁰ that unless the paradoxes and then the fundamental unresolved problems referred to above are satisfactorily addressed, we should subordinate, if not dismiss, the idea of a judicial superprecedent as we seek to understand and normatively steer the case adjudication process.

II. WHAT IS, OR SHOULD BE, A JUDICIAL SUPERPRECEDENT?

The idea of a judicial precedent in general, whether super or not, and whatever its complications, is a familiar one.¹¹ Whatever one’s preferred

304 (1816), on the Supreme Court’s ultimate authority over state courts in matters of federal law. Or perhaps a case might qualify as a superprecedent, in part, on either of the above theories.

⁶ See *infra* Part III, discussing paradoxes of the sheer logical impossibility of overruling certain doctrines; paradoxes of the inevitable reassertion of a case principle in the face of any overruling; paradoxes of otherwise clearly iconic superprecedents with chronically disappointing effects; and paradoxes of apparent superprecedents whose core holdings were arguably unnecessary and, in practice, do little jurisprudential work.

⁷ See *infra* Part IV.

⁸ See *infra* Part IV.

⁹ See *infra* Part IV.

¹⁰ See *infra* Part V.

¹¹ See generally BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016); RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); J. L. Montrose, *Distinguishing Cases and the Limits of Ratio Decidendi*, 19 MOD. L. REV. 525, 526 (1956) (“[I]t is inadequate to point to distinctions between cases without referring to the principles which make those distinctions significant.”); Frederick Schauer,

interpretive judicial method,¹² the question of a role for case precedent in general inevitably arises. We must at some point ask the broad questions posed by Professor Frederick Schauer: “When precedent matters, just *how much* should it matter? If we are to be shackled to the past and beholden to the future, just how tight are those bonds, and what should it take to loose [sic] them?”¹³

A familiar part of many attempts to answer just such general questions invokes the idea of a judicial superprecedent. The term “superprecedent” was used more than 40 years ago by Professors William Landes and Richard Posner.¹⁴ Landes and Posner invoked the idea of a case that is “so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place.”¹⁵

The term “super-stare decisis,” used in a related sense, was later adopted by then-Fourth Circuit Judge Michael Luttig.¹⁶ Judge Luttig interpreted the Court’s plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁷ as an attempt to definitively resolve basic controversies set in motion by *Roe v. Wade*,¹⁸ securing thereby “a woman’s fundamental right to choose whether or not to proceed with a pregnancy.”¹⁹ Judge Luttig thus understood the *Casey* plurality opinion as consciously seeking superprecedent status for *Roe*, if not also for itself.²⁰

The idea of a judicial superprecedent has gained wider public exposure through debates over the status of *Roe* and *Casey* in the context of Supreme Court nominations.²¹ *Roe*’s status as a possible judicial superprecedent has been the

Precedent, 39 STAN. L. REV. 571 (1987); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

¹² For example, this includes mainstream forms of originalism. See, e.g., Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1232–37 (2006); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009). For a shorter discussion, see John O. McGinnis, *How Originalism Integrates Precedent, Part I*, LAW & LIBERTY (Sept. 18, 2018), <https://www.lawliberty.org/2018/09/18/how-originalism-integrates-precedent-part-i/>.

¹³ Schauer, *supra* note 11, at 571.

¹⁴ See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

¹⁵ *Id.* at 251.

¹⁶ See *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376–77 (4th Cir. 2000) (Luttig, J.).

¹⁷ 505 U.S. 833 (1992).

¹⁸ 410 U.S. 113 (1973).

¹⁹ *Richmond Med. Ctr.*, 219 F.3d at 376.

²⁰ See *id.* at 376–77.

²¹ See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Committee on the Judiciary*, 115th Cong. 5–9 (2017) (statement of Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary), <https://www.govinfo.gov/content/pkg/CHRG->

subject of high-profile discussion.²² For the moment, though, we can say merely that *Roe* clearly illustrates the need for reflection on what should, or does, make a particular judicial case into a superprecedent. This broader, multi-dimensional question is pursued herein at some length.²³

An initial concern is what to make of the fact that *Roe* has withstood numerous judicial challenges, as well as attempted statutory limitations, and continuing public critique and debate.²⁴ Some theory is needed if we are to take these circumstances into proper account in determining the nature and application of superprecedent status. If an important case has been, and continues to be, repeatedly but unsuccessfully challenged, should that count in favor of superprecedent status? Against superprecedent status? Could there be more than one kind of “superprecedent”? Matters of definition, in this context, seem crucial.

Commentators have variously accorded and denied superprecedent status to a number of well-known judicial cases. Lists and individual examples of presumed superprecedents, on one definition or another, have been provided by writers with diverse interpretive methodologies and political perspectives. Thus, we have non-exhaustive lists from Judge Amy Coney Barrett²⁵ and from Professors Michael Gerhardt,²⁶ Mark Kende,²⁷ and Michael Sinclair,²⁸ among others, with a number of particular cases making multiple appearances.

115shrg28638/pdf/CHRG-115shrg28638.pdf; *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2–4 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary), <https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>; see also Orrin G. Hatch, *There’s Nothing “Super” About Roe v. Wade*, 29 STAN. L. & POL’Y REV. ONLINE 1 (Mar. 12, 2018). For journalistic coverage, see Jeffrey Rosen, *So, Do You Believe in “Superprecedent?”*, N.Y. TIMES (Oct. 30, 2005), <https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html/>. For a judicial reference to the purported status of *Roe* as a superprecedent in the context of Supreme Court confirmation proceedings, see *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, 888 F.3d 300, 310, 311–12 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part) (“Of course, there’s no such thing as “super-precedent”—any case may be overruled by five Supreme Court Justices.”).

²² See *infra* note 135 and accompanying text.

²³ See *infra* Parts II–IV.

²⁴ See *infra* note 135.

²⁵ See Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1734–35 (2013); see also Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 13–14 (2016).

²⁶ See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1208–17 (2006) [hereinafter Gerhardt, *Super Precedent*].

²⁷ See Mark S. Kende, *Is Bakke Now a Super-Precedent and Does It Matter? The U.S. Supreme Court’s Updated Constitutional Approach to Affirmative Action*, 16 U. PA. J. CONST. L.: HEIGHTENED SCRUTINY 15, 17 (2013).

²⁸ See Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 363–64 (2007).

Judge Barrett, for example, cites²⁹ the consensually backed³⁰ cases of *Marbury v. Madison*,³¹ *Martin v. Hunter's Lessee*,³² *Helvering v. Davis*,³³ the *Legal Tender Cases*,³⁴ *Mapp v. Ohio*,³⁵ *Brown v. Board of Education*,³⁶ and the *Civil Rights Cases*.³⁷ Professor Gerhardt cites³⁸ *Marbury*, perhaps *Duncan v. Louisiana*,³⁹ *Baker v. Carr*,⁴⁰ the *Legal Tender Cases*,⁴¹ the *Civil Rights Cases*, *Washington v. Davis*,⁴² and *Youngstown Sheet & Tube Co. v. Sawyer*.⁴³ In his turn, Professor Kende refers to the Justice Lewis Powell opinion in *Regents of the University of California v. Bakke*,⁴⁴ *Marbury*, *Brown*, the Jackson opinion in *Youngstown*, and *Griswold v. Connecticut*.⁴⁵ Finally, Michael Sinclair discusses

²⁹ See Barrett, *supra* note 25.

³⁰ See *id.* at 1734.

³¹ 5 U.S. 137 (1803) (establishing judicial review of congressional statutes).

³² 14 U.S. 304 (1816) (validating Supreme Court review of federal question determinations by state courts).

³³ 301 U.S. 619 (1937) (constitutionally validating the Social Security Act).

³⁴ 79 U.S. 457 (1870) (constitutionally validating the Treasury's issuance of paper money as legal tender).

³⁵ 367 U.S. 643 (1961) (incorporating the Fourth Amendment against the states through the Fourteenth Amendment due process clause).

³⁶ 347 U.S. 483 (1954) (prohibiting purportedly separate-but-equal public-school racial segregation).

³⁷ 109 U.S. 3 (1883) (requiring a showing of state, as distinct from mere private party, action under the Fourteenth Amendment).

³⁸ See Gerhardt, *supra* note 26.

³⁹ 391 U.S. 145 (1968) (providing a rationale for the Fourteenth Amendment incorporation doctrine).

⁴⁰ 369 U.S. 186 (1962) (defining the scope and limits of the political question doctrine regarding equal-protection challenges to state legislative apportionment).

⁴¹ 79 U.S. 457 (1870).

⁴² 426 U.S. 229 (1976) (delimiting the roles of strict and minimum scrutiny in racial equal protection context).

⁴³ 343 U.S. 579 (1952) (Jackson, J., concurring) (presenting an analytical framework for delineating the scope of presidential executive authority).

⁴⁴ 438 U.S. 265 (1978) (emphasizing educational diversity goals as tested by a strict scrutiny standard).

⁴⁵ 381 U.S. 479 (1965) (narrowly rejecting a state statute limiting the use of contraceptives by married couples and more broadly invigorating privacy or autonomy-oriented substantive due process).

*Roe v. Wade*⁴⁶ but considers *Marbury* and *Erie Railroad Co. v. Tompkins*⁴⁷ to be clearer instances of superprecedents.⁴⁸

These cases do not exhaust the roster of arguable superprecedents. Other cases certainly might be added.⁴⁹ All such superprecedent candidates contribute something both toward formulating one or more definitions of a superprecedent as well as toward other ways of usefully characterizing superprecedents. As it turns out, a number of proposed alternative characterizations are currently available. The proposed alternative characterizations vary in their focus and stringency, but there are certainly some recurring themes among the possible understandings of a judicial superprecedent.

Perhaps the most widely discussed account of the idea of a judicial superprecedent is that offered by Professor Michael Gerhardt.⁵⁰ Professor Gerhardt's most concise formulation of the idea of a superprecedent refers simply to "prior case law which is practically immune to reconsideration."⁵¹ He then adds that the immunity from reconsideration must reflect the

⁴⁶ 410 U.S. 113 (1973) (recognizing a substantive due process abortion right with regulations subject to strict scrutiny).

⁴⁷ 304 U.S. 64 (1938) (disempowering federal courts from establishing a general federal law when sitting in diversity jurisdiction).

⁴⁸ See Sinclair, *supra* note 28, at 364–65.

⁴⁹ See, e.g., Allison R. Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Superprecedent?: Clues from Wisconsin and Vermont*, 2006 CATO SUP. CT. REV. 195, 202 (2006); Russell A. Hilton, Comment, *The Case for the Selective Disincorporation of the Establishment Clause: Is Everson a Super-Precedent?*, 56 EMORY L.J. 1701, 1742 (2007) ("Descriptively speaking, . . . *Everson*'s incorporation of the Establishment Clause [as binding the states] likely qualifies as a super-precedent," in the sense that, whatever its cogency in other respects, "*Everson*'s status will likely prevent the Court from overruling it."). Hayward cites, along with *Marbury* and the *Legal Tender Cases*, the separation of powers case of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld certain statutory limitations on the President's power to remove quasi-legislative or quasi-judicial officials. Hayward, *supra*. The significance of *Humphrey's Executor* seems, however, to be called into question by the broader test adopted in *Morrison v. Olson*, 487 U.S. 654, 686–91 (1988).

⁵⁰ See Gerhardt, *Super Precedent*, *supra* note 26; see also Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279 (2008) [hereinafter Gerhardt, *The Irrepressibility of Precedent*]. Among the many discussions of Professor Gerhardt's approach, see, for example, GARNER ET AL., *supra* note 11, at 235; Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 50 (2008); Liaquat Ali Khan, *Temporality of Law*, 40 McGEORGE L. REV. 55, 85 (2009); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1062–64 (2013); William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1272–73 (2011). It is also certainly possible to be generally skeptical of the idea of a judicial superprecedent. See, e.g., Ilya Somin, *Why "Settled Law" Isn't Really Settled—and Why That's Often a Good Thing*, VOLOKH CONSPIRACY (Sept. 9, 2018, 3:57 PM), <https://reason.com/2018/09/09/why-settled-law-isnt-really-settled-and/>.

⁵¹ Gerhardt, *The Irrepressibility of Precedent*, *supra* note 50, at 1292.

“well-settled”⁵² status of the case in question.⁵³ At least a necessary condition for superprecedent status, Professor Gerhardt continues, is that the case “has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.”⁵⁴ The “precedents which are the least likely to be reopened because of the practical impossibility of finding compelling reasons to reopen them are, effectively, superprecedents.”⁵⁵

A bit more elaborately, Professor Gerhardt then argues that superprecedents are those constitutional decisions in which public institutions have heavily invested,⁵⁶ have repeatedly relied upon, and have consistently supported over a significant period of time. Superprecedents thus seep into the public consciousness⁵⁷ and become fixtures of the legal framework. Superprecedents are the clearest instances in which “the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—have become irredeemably compelling.”⁵⁸

Crucially, Professor Gerhardt consistently refers to superprecedents as “foundational” with regard to legal practices, or foundational with regard to doctrine, or foundational with regard to other decisions.⁵⁹ The foundationalist

⁵² *Id.* at 1293.

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1295. The mere practical unlikelihood of a case being reopened, however, tells us little about superprecedent status. A broadly cited case might be secure because its very openness, if not near emptiness, is compatible with a range of case outcomes, generally, or in any given case. See, for example, the general balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁵⁶ There may also be precedents that are especially unlikely to be reopened, and which no one wants to reopen, but only because those precedents have no contemporary relevance, and have receded in history’s wake. Such cases, as now practical irrelevancies, are not superprecedents, but close to the opposite. And some cases may be practically irreversible merely because of the distribution of political power, rather than from a consensus as to the merit or authority of the case decision.

⁵⁷ It seems doubtful, however, that otherwise uncontroversial candidates for superprecedent status must have seeped into the public consciousness as case authorities. Merely for example, the public, at least for the present, consciously thinks of paper money as legal tender. But the public typically has no thought, conscious or otherwise, of the *Legal Tender Cases*, 79 U.S. 457 (1870). In particular, Professor Gerhardt discusses the *Legal Tender Cases* in Gerhardt, *Super Precedent*, *supra* note 50, at 1213–14. Consider also the possible disappearance of paper money, as discussed in Nicolas Colas, *Reports of Cash’s Death Are Greatly Exaggerated*, BLOOMBERG (Aug. 28, 2017, 5:04 PM), <https://www.bloomberg.com/opinion/articles/2017-08-28/reports-of-cash-s-death-are-greatly-exaggerated>; Rose Eveleth, *The Truth About the Death of Cash*, BBC (July 24, 2015), <http://www.bbc.com/future/story/20150724-the-truth-about-the-death-of-cash>; Nathaniel Popper et al., *Will Cash Disappear?*, N.Y. TIMES (Nov. 14, 2017), <https://www.nytimes.com/interactive/2017/11/14/business/dealbook/cashless-economy.html>.

⁵⁸ Gerhardt, *Super Precedent*, *supra* note 26, at 1206.

⁵⁹ The characterization of superprecedents as thus foundational recurs throughout Gerhardt. *Id.* For important problems with the “foundation” metaphor, see *infra* Part IV.

metaphor has been, importantly, taken up in this context by others.⁶⁰ As we shall see, however, the foundationalist metaphor, even if otherwise illuminating, is also crucially misleading.⁶¹

Other writers and judges have offered a range of alternative understandings of the idea of a superprecedent. Consider, for example, the approach advocated by now-Seventh Circuit Judge Amy Coney Barrett and by her colleague Professor John Nagle.⁶² Judge Barrett suggests that “[s]uperprecedents are cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds.”⁶³

A case’s exceptional unlikelihood of being overruled may, however, be due to considerations that would actually call the case’s status as a superprecedent into question. For example, long-standing and unquestioned precedent may address merely once-important matters that no longer have legal relevance.⁶⁴ More controversially, some important open-ended multi-factor balancing tests may, precisely because of their manipulability to a broad range of ends, avoid meaningful challenge, but at the price of not really controlling legal outcomes in a large number of cases.⁶⁵

Judge Barrett then indicates that the force of superprecedents crucially “derives from the people, who have taken their validity off the Court’s agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling.”⁶⁶ Or, as otherwise put by Barrett and Nagle, superprecedent status for cases flows not from the Court’s decision to afford them precedential strength, but from “the People’s choice to accept them.”⁶⁷ This suggests both that a court cannot successfully bootstrap a controversial case into superprecedent status by its own declarations⁶⁸ and that

⁶⁰ See *infra* Part IV.

⁶¹ See *infra* Part IV.

⁶² Barrett, *supra* note 25, at 1734; see also Barrett & Nagle, *supra* note 25, at 2–3.

⁶³ Barrett, *supra* note 25, at 1734. As a possible corollary, there may be cases such that disagreement with the outcome or basic thrust thereof would disqualify Supreme Court nominees. See Kende, *supra* note 27.

⁶⁴ Consider, for example, broad constitutional or regulatory case holdings as to once dominant but now completely obsolete technologies or methods of communication.

⁶⁵ For example, *Mathews v. Eldridge* has been cited, per a Westlaw case search, more than 14,000 times, emerging largely unscathed. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Eldridge* three-part balancing test embodies evident common sense, but at a level of generality, and of manipulability, too high to meaningfully constrain the outcome of seriously contestable cases. See *id.* at 335.

⁶⁶ Barrett, *supra* note 25, at 1735.

⁶⁷ Barrett & Nagle, *supra* note 25, at 3.

⁶⁸ See *supra* notes 16–20 and accompanying text.

we should not think of a case with elite and institutional level support as a superprecedent if that case lacks popular support.

Barrett and Nagle thus follow most writers in assuming that what typically distinguishes a superprecedent from a non-superprecedent is a matter of a case's insusceptibility, or likely insusceptibility, to overruling.⁶⁹ Whether a case could lose superprecedent status only through increased vulnerability to overruling is a crucial question taken up below.⁷⁰

A number of writers think of superprecedence through the "entrenchment" or "embeddedness," in some distinctive way or degree, of the case in question.⁷¹ Beyond the idea of some form of embeddedness, observers also raise questions as to whether, for example, the case in question counts as a "landmark,"⁷² or has seen "repeated reaffirmations."⁷³ Perhaps, on this latter view, a case whose stature has discouraged any challenges, and has thus had no occasion to be reaffirmed, would count necessarily as a "landmark" case.⁷⁴

It is also possible to characterize superprecedents partly in terms of the process leading up to the decision in question. Thus Matthew E.K. Hall recommends asking whether the case in question was "the product of a protracted political struggle that engaged the public in a period of higher lawmaking."⁷⁵ Of course, we may be likely to dispute whether any given decision really reflects some extraordinary process of vaguely defined higher lawmaking.⁷⁶ And if we

⁶⁹ See Barrett, *supra* note 25; see also Barrett & Nagle, *supra* note 25, at 2–3.

⁷⁰ See *infra* Part IV.

⁷¹ See, e.g., Barnett, *supra* note 12, at 1239 ("These precedents seem deeply embedded in current institutional practice, such that overruling them would wreak much social disruption.") (adding the condition that "no one wants to see them overturned"); Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1037 (2018) (referring to "entrenched legal principles that are . . . no longer the subject of serious deliberation, even though reasonable minds could potentially differ on their validity or whether they provide the best solution to a problem") (reviewing KOZEL, *supra* note 11); Daniel Solove, *The Problem with Superprecedent*, CONCURRING OPINIONS (Oct. 30, 2005), https://concurringopinions.com/archives/2005/10/the_problem_wit.html ("The notion of superprecedent is that there are cases that are so firmly entrenched that they ought not to be overturned despite being in error. *Roe v. Wade* is the superprecedent that most have in mind.").

⁷² Richard H. Fallon, *Constitutional Precedents Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1111 (2008).

⁷³ *Id.*

⁷⁴ See *id.* "Landmark" status is presumably achieved, in typical cases, only over a period of time, whether the case is repeatedly reaffirmed, or left essentially unchallenged and in that sense not reaffirmed.

⁷⁵ Matthew E.K. Hall, *Bringing Down Brown: Super Precedents, Myths of Rediscovery, and the Retroactive Canonization of Brown v. Board of Education*, 18 J.L. & POL'Y 665, 673 (2010).

⁷⁶ See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991) (seeking to contrast "normal politics" with "higher lawmaking"); Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731 (1999) (reviewing ACKERMAN, *supra*).

decided, for example, that *Marbury* was not the product of a prolonged public political struggle amounting to higher lawmaking, we would then have to choose between excluding *Marbury* as a superprecedent and revising Hall's recommended understanding thereof.

Other creative approaches are possible as well. Colin Starger thus suggests that a case does, or should, have superprecedent status when not only its own rule is widely accepted,⁷⁷ but when the second-order rules for interpreting and implementing that case are also agreed upon, such that overruling the underlying first-order case "has become unthinkable."⁷⁸ This approach thus might be considered one of focusing on multi-layered entrenchment.⁷⁹

This implementation-oriented approach to superprecedent status, however, seems to be in tension with yet another intriguing approach to defining superprecedence. Allison Hayward has thus suggested that "perhaps the true test of a superprecedent is not whether there has been substantial reliance on it, . . . or whether it settles a question for all time, but whether it can be cited in support of *conflicting conclusions*."⁸⁰ One ironic implication of Hayward's approach seems to be that superprecedent status can be associated with the case's own lack of constraining power on later judicial outcomes, perhaps through vagueness, manipulability, or indeterminacy of implication and inference.

We might instead think of a typical superprecedent as exerting control over a broad range of legal outcomes, as perhaps in *Marbury*'s firmly establishing judicial review over congressional judgment on matters of constitutional interpretation.⁸¹ *Marbury* thus dictates outcomes at that level of generality. We know in advance whether Congress or the Supreme Court will win such a conflict in a given case. But it may also seem, as Hayward suggests,⁸² that some candidates for superprecedent status are not far from mere formulaic injunctions for judges to take the relevant factors into account and strike a sensible balance.⁸³ Such cases are thus often citable on either side of the case.⁸⁴

Finally, consider the suggestion of Professor Mark Kende that superprecedent status may reflect a case's vitality and impact on the law and on the practices of lay institutions and persons.⁸⁵ Particularly in light of *Bakke*'s

⁷⁷ Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 LOY. L.A. L. REV. 77, 149 (2012).

⁷⁸ *Id.*

⁷⁹ See *supra* note 71.

⁸⁰ Hayward, *supra* note 49, at 205.

⁸¹ See *Marbury v. Madison*, 5 U.S. 137 (1803).

⁸² See Hayward, *supra* note 49, at 205.

⁸³ See, for example, the discussion of the three-factor balancing test in the procedural due process case of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See also text accompanying *supra* note 65.

⁸⁴ See Hayward, *supra* note 49, at 205.

⁸⁵ See Kende, *supra* note 27, at 18.

apparent fragility,⁸⁶ Kende refers⁸⁷ in particular to the initially isolated opinion by Justice Powell in the *Bakke* case.⁸⁸ We can easily see how a case's current vitality and its effects on case law and daily practices might well bear upon the question of superprecedent status. It is less clear, though, why superprecedent status should be associated with initially vulnerable but now flourishing opinions⁸⁹ as opposed to unanimous opinions.⁹⁰ Perhaps the idea is that initially vulnerable but now widely influential opinions have shown a distinctive hardiness that bodes well for the future of the opinion.⁹¹

There is thus a wide variety of partly conflicting understandings of what a superprecedent is or should be. The lack of a complete consensus on such definitional matters is not, however, as disturbing as the unresolved and typically unrecognized fundamental issues unavoidably raised by the idea of a superprecedent. We address several of these fundamental issues below.⁹² But first, we should consider whether a focus on specific commonly proposed superprecedents themselves, as distinct from theoretical accounts of superprecedents in general, meaningfully contributes to our understanding of superprecedents. As it turns out, at the level of individual case candidates for superprecedent status, we encounter a series of distinct paradoxes. These various case-level paradoxes should, even if they are surprising or counterintuitive, inform our understanding of the idea of a superprecedent.

III. UNDERSTANDING THE IDEA OF A SUPERPRECEDENT THROUGH COMMONLY PROPOSED CASES: THE PERVASIVENESS OF PARADOX

Given the inadequacies of and conflicts among the above accounts of superprecedence, it is natural to consider the situation on the ground in the form of particular cases typically proposed for superprecedent status. In the absence of any more systematic approach, we now briefly consider some of the lessons to be drawn from the cases, presented in roughly chronological order. As it turns out, paradox in one form or another is a recurring theme. Among the most obvious early candidates, on mainstream theories, for superprecedent status are the cases of *Marbury*, establishing, roughly, judicial review for the

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–321 (1978).

⁸⁹ See *id.*

⁹⁰ See, for example, the unanimous opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁹¹ By loose analogy, we might credit the Powell opinion in *Bakke* with having a more robust “immune system” than that of a typical unanimous judicial opinion, all else equal.

⁹² See *infra* Part IV.

constitutionality of federal statutes,⁹³ and *Martin*, establishing the Supreme Court as typically the final judge of state court decisions as to federal law.⁹⁴

A. *Marbury v. Madison*

Marbury is especially distinctive in that there is a sense in which it would, remarkably, be logically impossible for the Court to overrule *Marbury*'s basic principle. There is thus something of a paradox here. To see this, think of the *Marbury* holding as that the Supreme Court has the final authority on constitutional questions, including those of separation of powers. The *Marbury* Court ironically arrogated to itself this authority in the context of disclaiming the power to hear a particular case.⁹⁵ More ironically, though, the general power of judicial review is, in a sense, not disclaimable through ordinary adjudication. For the Court to overrule, and deny, a principle of judicial review would be inescapably—however paradoxically—to retain and reassert that very principle at a higher but still ultimately authoritative level.

Thus, the *Marbury* Court famously declares that above and beyond the views, oaths, and proper functions of the other branches, “[i]t is emphatically the province and duty of the judicial department⁹⁶ to say what the law is.”⁹⁷ For the Court to reverse itself on this point would, ironically, merely reassert at a higher level its own continuing final authority on such matters. The Court would still have the final word. We might thus think of the Court’s hypothetical overruling of *Marbury* as saying something like “we lack final judgment on such a question, and that is our universally binding, higher-order final judgment on just such questions.”

Of course, we can easily imagine alternative constitutional regimes with any and all variations from our familiar form of judicial review, including weak and strong forms, subject matter limitations, differences in institutional arrangements, or having no judicial review at all.⁹⁸ There is obviously a broad

⁹³ See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

⁹⁴ See generally *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

⁹⁵ See *Marbury*, 5 U.S. at 176–77.

⁹⁶ And, ultimately, the Supreme Court in particular.

⁹⁷ *Marbury*, 5 U.S. at 177.

⁹⁸ From among the vast literature of the merits and disadvantages of one form of judicial review or another, see, for example, LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Alexander, *What Is the Problem of Judicial Review?*, 31 AUSTRALIAN J. LEGAL PHIL. 1 (2006); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013 (2004); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Michael J. Perry, *A Theory of Judicial Review* (Emory Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 16-396, 2016), <http://ssrn.com/abstract=2624978>; Mark Tushnet, *Against Judicial Review* (Harvard Law Sch.,

spectrum of alternatives to a *Marbury*-like judicial review regime, along any number of dimensions, with a nearly infinite number of possible gradations along the spectra.⁹⁹ There is no paradox involved in imagining any such variation in operation. Some viable alternatives will be closely akin to the *Marbury* holding itself. Other alternatives will be more distant from *Marbury* in principle and practical effect.

This raises the broader question, addressed further below,¹⁰⁰ of what it means to not follow, or to no longer follow, a supposed superprecedent. Legal writers commonly refer, without any of the necessary clarification, to something like the difficulty or impropriety of overruling, reversing, overturning, or somehow not following a purported superprecedent. But this might refer to anything from the extreme of figuratively standing a superprecedent on its head or adopting some diametrically opposite approach, to vaguely undermining, to significantly modifying the holding, or else to doing what amounts to fine-tuning, adjusting, or perhaps to merely qualifying or minimally limiting the purported superprecedent. The basic problem here is one of whether any, if not all, of these varied responses to a case are compatible with the case's continuing superprecedent status.

B. *Martin v. Hunter's Lessee*

In contrast, the case of *Martin*, as a purported superprecedent presents a looser but still quite real form of paradox. Let us assume that *Martin* held, however oversimplified, that the Supreme Court can serve as a court of final appeal on significant questions of federal law, including questions of constitutional law, even if those questions are raised and decided initially by state courts.¹⁰¹

We can imagine a judicial decision, in the form of an “anti-*Martin*,” that instead allowed each state to be sovereign and unreviewable in its own interpretation of the federal Commerce Clause, and in that respect restoring something like the obvious deadweight efficiency losses suffered under the

Pub. Law & Legal Theory, Research Paper Series, Working Paper No. 09-20, 2009), <http://ssrn.com/abstract=1368857>; Jeremy Waldron, *Judicial Review and Judicial Supremacy* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 14-57, 2014), <https://ssrn.com/abstract=2510550>. For a classic account of *Marbury*, the case itself, see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. See also Larry Kramer, *We the People*, BOS. REV. (Mar. 2004), <https://bostonreview.net/archives/BR29.1/kramer.html>.

⁹⁹ See the various international and hypothetical examples discussed in *supra* note 98.

¹⁰⁰ See *supra* Part II; *infra* Part IV.

¹⁰¹ See, e.g., Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 55; see also Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

Articles of Confederation.¹⁰² But in practice, over time, the basic *Martin* rule would, unlike most other overruled precedents, have an especially strong “buoyancy,” or a systematic, predictable, and persistent tendency to reassert itself in one way or another.¹⁰³ Rules that are patently and generally inefficient, in substantial measure, from all relevant parties’ perspectives, strongly invite their being somehow contracted around or otherwise negated.¹⁰⁴

The basic *Martin* principle and its hypothetical replacement are thus not essentially two different ways of slicing up a fixed distributional pie. *Martin* is not so much about winners and losers at the level of individual states or commercial enterprises as it is about avoiding tempting, but ultimately generally self-defeating, economic behavior. The “deeper” that any anti-*Martin* case sought to “sink” the basic *Martin* principle regarding commerce, the greater the tendency for that principle or something akin to *Martin* to rise again in the surface. Obviously much more efficient and collectively beneficial rules tend, especially, to thus somehow reassert themselves.

Professor H. Jefferson Powell has already argued that “*Martin*’s holding that the Supreme Court may constitutionally review state court holdings on federal law matters is so foundational¹⁰⁵ an element of the American legal system that it is difficult for us to take rejection of it seriously.”¹⁰⁶ Our point is that *Martin* is not simply quite popular, taken for granted, off the agenda, or supported by powerful groups. Rather, to change the metaphor, any attempt to do away with the basic *Martin* principle would predictably boomerang for independent and inescapable basic reasons, as recognized in part by the *Martin* Court itself¹⁰⁷ and, then, to at least some degree by Justice Oliver Wendell Holmes, Jr.¹⁰⁸ The distinctive “buoyance,” or the distinctively strong

¹⁰² For discussion of the obvious costs of allowing each state to read the federal Commerce Clause to its own initial advantage, to the prejudice of other states generally, and ultimately thereby to its own prejudice, see *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

¹⁰³ See generally Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA L. REV. 1697 (1996).

¹⁰⁴ See *id.*

¹⁰⁵ But for critical discussion of this popular metaphor, see *infra* Part IV.

¹⁰⁶ H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 675 (1993).

¹⁰⁷ *Martin* itself observes that “[t]he Constitution has presumed . . . that . . . state interests . . . might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.” 14 U.S. 304, 347 (1816); see also David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 682 (1982).

¹⁰⁸ Justice Holmes declared:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not

“boomerang quality,” of *Martin* is thus not reducible to merely the popularity or elite-level support of *Martin* at the time of its hypothetical overruling.

To briefly review, then, *Marbury* is in an important sense logically not judicially overruleable, whatever the results of any judicial turning away from the *Marbury* holding.¹⁰⁹ *Martin* is in an entirely different sense not practically overruleable over time, given the monumental and unavoidable structural incentives to reassert and restore a uniform commerce regulation rule at least strongly akin to that of *Martin*.¹¹⁰

C. *Brown v. Board of Education*

Brown, in contrast, presents yet another kind of paradoxical complication as a presumed superprecedent. *Brown* has itself divided over time into, on the one hand, a non-overruleable symbolic and expressive public message and, on the other, a legal rule with shifting, disputable, and perhaps only quite limited purchase on the actual circumstances of public-school education.

Thus, in a sense, *Brown* is the epitome of what many writers have in mind when they suggest that some cases are, or should be regarded as, superprecedents.¹¹¹ But while a broad rejection of the symbolic or expressive dimension of *Brown* would be to invoke something akin to a secular equivalent of the taboo,¹¹² there can also be serious question as to how different patterns of public-school racial segregation would be today if *Brown* itself had been written differently, in any number of respects. We understand today that at minimum, an earnest judicial proclamation of a constitutional principle may not be successfully translated, even over time, into daily social and cultural in

trained to national views, and how often action is taken that embodies what the Commerce Clause was meant to end.

Oliver Wendell Holmes, Jr., Associate Justice, U.S. Supreme Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913) (quoted in Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 688 (1916)). For discussion of the “race to the bottom” state regulatory coordination problem, see *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 588–89 (1937) (Cardozo, J.).

¹⁰⁹ See *supra* notes 93–100.

¹¹⁰ See *supra* notes 93–108.

¹¹¹ See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1789 (2007) (“[A]ny lawyer . . . who questions *Brown*’s legitimacy places himself outside the jurisprudential mainstream.”) (noting a “long delay before *Brown* achieved its canonical status”); Hall, *supra* note 75, at 657–58 (“[S]enators and scholars seem to agree: if there are superprecedents in American constitutional law, *Brown v. Board of Education* is one of them.”); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 543 (1999) (“*Brown* . . . which was a controversial decision in 1954 . . . is the third rail of judicial nomination: touch it and you die.”); Pamela S. Karlan, *What Can Brown® Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1049 (2009).

¹¹² See *supra* note 111; see also *Taboo*, OXFORD ENG. DICTIONARY (2018), www.oed.com/view/Entry/196824?rskey=EkeZVI&result=1#eid.

constitutional practice.¹¹³ Proclamation is not implementation. And without entering here into the merits of the debate, it is clear that 60 years after segregationist “massive resistance,”¹¹⁴ the realistic impact of *Brown* on public-school racial segregation may be surprisingly modest.¹¹⁵

Brown might thus reasonably qualify as both the quintessential superprecedent and as a remarkable disappointment with regard to its practical execution and impact.¹¹⁶ Here, the paradox thus takes the form of a symbolically important case opinion often taken to be among the clearest of superprecedents, but which has, arguably, only a remarkably limited gravitational influence on the real world events most central to its purported scope. We would hardly expect this latter inefficacy to be characteristic of any superprecedent, let alone a purportedly central such superprecedent.

D. Griswold v. Connecticut

Finally, there is a fourth kind of paradox that may attend purported case superprecedents. It is possible for a purported superprecedent to govern, again

¹¹³ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

¹¹⁴ See generally *The Southern Manifesto and “Massive Resistance” to Brown*, NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/> (last visited Sept. 10, 2019).

¹¹⁵ Some of the causal responsibility in this respect has been imputed to the equivocality and limited ambition of *Brown*’s implementing cases, beginning with *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955). For broader discussion, see CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); GARY ORFIELD ET AL., *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY, AND STATE* 1 (2016), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf> (referring to the “spreading and deepening segregation in our nation’s schools”); SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? (John Charles Boger & Gary Orfield eds., 2005); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2002); Moriah Balingit, *Florida’s Schools—Once Integration’s Great Hope—Are Resegregating*, WASH. POST (Oct. 10, 2017), <https://www.washingtonpost.com/news/education/wp/2017/10/10/floridas-schools-once-integrations-great-hope-are-resegregating/?noredirect=on>; Emma Brown, *On the Anniversary of Brown v. Board, New Evidence that U.S. Schools Are Resegregating*, WASH. POST (May 17, 2016), <https://www.washingtonpost.com/news/education/wp/2016/05/17/on-the-anniversary-of-brown-v-board-new-evidence-that-u-s-schools-are-resegregating/> (“Poor, black and Hispanic children are becoming increasingly isolated from their white, affluent peers in the nation’s public schools . . .”); Ronald Brownstein, *How Brown v. Board of Education Changed—and Didn’t Change—American Education*, ATLANTIC (Apr. 25, 2014), <https://www.theatlantic.com/education/archive/2014/04/two-milestones-in-education/361222/>; Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614/> (“Racially divided schools are a major and intensifying problem for American education—maybe even a crisis.”).

¹¹⁶ See *supra* note 115.

however paradoxically, an area of the law where no Supreme Court or other precedent, let alone a superprecedent, was or is genuinely required. Consider, in this regard, the substantive due process case of *Griswold*.¹¹⁷ *Griswold* is known for Justice William O. Douglas's citation of a number of distinct enumerated constitutional rights¹¹⁸ as collectively implying the unconstitutionality, under a substantive due process concern for privacy or autonomy,¹¹⁹ of a Connecticut statute prohibiting the marital use, for the particular purpose of preventing conception,¹²⁰ of contraceptives.¹²¹ Justice Douglas's opinion emphasizes in particular the nobility and significance of the "bilateral loyalty"¹²² involved in marriage as an institutional relationship.¹²³

We may quite reasonably assume that the influence of *Griswold* on later jurisprudence, and even on the broader culture, suffices for superprecedent status.¹²⁴ Opposition to *Griswold* might tend to derail a nomination to the Supreme Court.¹²⁵ But the actually necessary holding or ratio decidendi¹²⁶ of *Griswold* is narrow and indeed uncontroversial at the level of contemporary morality and politics, as applied to direct violators rather than to accessories.¹²⁷

Thus Justice Douglas asks in *Griswold* whether we would "allow" the police to search "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."¹²⁸ To deny the police this general authority, however, does not require any creative aggregation of only loosely related constitutional

¹¹⁷ 381 U.S. 479 (1965); *supra* text accompanying note 45.

¹¹⁸ See *Griswold*, 381 U.S. at 484–86.

¹¹⁹ See *id.*

¹²⁰ See *id.* at 480.

¹²¹ See *id.*

¹²² *Id.* at 486.

¹²³ See *id.* at 485–86; see also William W. Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade*, 1989 DUKE L.J. 1677, 1677–78 (1989).

¹²⁴ For a sense of that influence, see, for example, Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.: F. (2015), <https://www.yalelawjournal.org/forum/how-conflict-entrenched-the-right-to-privacy> (recounting, in particular, the subsequent validation, reliance thereon, and the expansionist case law); Evan Bernick, *Griswold at 50: An (Incomplete) Constitutional Revolution and Its Meaning Today*, HUFFINGTON POST (June 9, 2015, 11:43 AM), https://www.huffpost.com/entry/griswold-at-50-an-incompl_b_7544458?

¹²⁵ See Gerhardt, *Super Precedent*, *supra* note 50, at 1220; Tamar Lewin, *The Bork Hearings; Bork Is Assailed Over Remarks on Contraceptive Ruling*, N.Y. TIMES (Sept. 19, 1987), <https://www.nytimes.com/1987/09/19/us/the-bork-hearings-bork-is-assailed-over-remarks-on-contraceptive-ruling.html>.

¹²⁶ See, classically, Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 161 (1930).

¹²⁷ As to the complications of accessory liability in *Griswold*-type cases, see the remarks of Harriet Pilpel reported in Lewin, *supra* note 125.

¹²⁸ *Griswold*, 381 U.S. at 485.

rights.¹²⁹ Much more narrowly, the law could simply presume that officially invading the marital, or any other, bedroom under *Griswold*-type circumstances would be considered unconstitutional as an unreasonable search.¹³⁰ And even this rule would be far broader than is actually necessary, given the relevant statute's unpoliceable distinction between the use of a contraceptive for the particular purpose of contraception¹³¹ and use for any other purpose, including preventing disease.

Thus, the *Griswold* case does not leave us with a choice merely between *Griswold* as a broad substantive due process privacy precedent¹³² and denying relief to the defendants. *Griswold*-type enforcement against principals would almost inevitably violate some provision explicitly enumerated in the Constitution.¹³³ The statute in *Griswold* was inescapably unconstitutional on prosaic and uncontroversial search and seizure grounds.¹³⁴ *Griswold* may be deemed a superprecedent in view of its sustained influence and expansion in important contexts.¹³⁵ But this has little to do with what would be reasonably necessary in order to hold typically unconstitutional the statute in question.¹³⁶ Thus, *Griswold* offers yet another form of paradox to those forms already encountered above.¹³⁷

Overall, then, neither the major theoretical approaches to superprecedent status¹³⁸ nor the typically cited purported superprecedents themselves¹³⁹ leave us with any clarity as to the idea of a judicial superprecedent or of its jurisprudential value. Below, this Article explores three important underlying reasons for the continuing lack of clarity and genuine usefulness of the idea of a superprecedent. Unless and until these underlying problems can be successfully addressed, we

¹²⁹ See *id.* at 484.

¹³⁰ For a start, see *id.* at 485.

¹³¹ See *id.* at 480.

¹³² *Griswold* is, merely for example, crucially cited in *Roe v. Wade*, 410 U.S. 113, 129 (1973), in *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003), and in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

¹³³ See *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting) (The statute may be “uncommonly silly,” “obviously unenforceable,” “unwise, or even asinine” but, as supposedly in *Griswold*, not unconstitutional.).

¹³⁴ See *id.* at 484–85; *supra* note 130 and accompanying text. The possibility of a testimonial marital privilege further limits the need for a broad holding in *Griswold*.

¹³⁵ See *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting). For a sense of the debate over whether *Roe* does, or should, qualify as a superprecedent, see, for example, Fallon, *supra* note 72, at 1149; Sinclair, *supra* note 28, at 408; Hatch, *supra* note 21; Rosen, *supra* note 21.

¹³⁶ See *Griswold*, 381 U.S. at 484–85 (majority opinion); *supra* note 130 and accompanying text.

¹³⁷ See *supra* notes 93–116.

¹³⁸ See *supra* Part II.

¹³⁹ See *supra* Part III.

are best advised to, at a minimum, downgrade the significance of claims to superprecedential status.

IV. SUPERPRECEDENCE: THREE CRUCIAL UNDERLYING PROBLEMS

The first underlying problem to be recognized is that our general “picture” of superprecedents is incomplete, if not crucially defective. This is because our mental image of a superprecedent relies, often explicitly,¹⁴⁰ on such a case as being considered “foundational.”¹⁴¹ Even when we do not describe a superprecedent as somehow “foundational,” we commonly substitute the near synonym of the superprecedent as “bedrock.”¹⁴² The description of a superprecedent as somehow “foundational” may seem uncontroversial, and even inevitable. This metaphor, however, is at least as misleading as it is helpful.

Consider, by way of loose analogy, the ongoing dispute among philosophers as to whether knowledge must ultimately rest upon some foundational, bedrock, or literally basic truth. Some philosophers are indeed in this sense foundationalists.¹⁴³ But certainly not all philosophers rely in this context on the idea of foundations, or of bedrock.¹⁴⁴ In particular, many philosophers “favor a holistic picture of justification which does not distinguish between basic or foundational and non-basic or derived beliefs, treating, rather, all our beliefs as equal members”¹⁴⁵ or as members of a “web of belief.”¹⁴⁶ On

¹⁴⁰ See, e.g., Barrett & Nagle, *supra* note 25 (multi-dimensional foundationalism); Gerhardt, *supra* note 26, at 1206–17 (focusing, respectively, on foundational institutional practices, foundational doctrines, and foundational decisions); Hayward, *supra* note 49, at 202; Sinclair, *supra* note 28, at 402; Jack M. Balkin, *Don’t Talk to Me About Superprecedents*, BALKINIZATION (Oct. 30, 2005), <https://balkin.blogspot.com/2005/10/dont-talk-to-me-about-superprecedents.html>.

¹⁴¹ See *supra* note 140.

¹⁴² See, e.g., Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–84 (2006) (referring to “bedrock precedents”). Professor Farber then defines “bedrock precedents” as “precedents that have become the foundation for large areas of important doctrine,” and thus relies on the metaphor of a foundation. *Id.* at 1180. For discussion of Professor Farber on this point, see Barnett, *supra* note 12, at 1235–38.

¹⁴³ For background in the context of the idea of a justified belief, see Ali Hasan & Richard Fumerton, *Foundationalist Theories of Epistemic Justification*, STAN. ENCYCLOPEDIA PHIL. (Oct. 24, 2016), <https://plato.stanford.edu/entries/justep-foundational/> (citing, classically, the thought of Aristotle and Descartes). See also William Alston, *Two Types of Foundationalism*, 73 J. PHIL. 165 (1976); Timm Triplett, *Recent Work on Foundationalism*, 27 AM. PHIL. Q. 93 (1990).

¹⁴⁴ See, e.g., Erik Olsson, *Coherentist Theories of Epistemic Justification*, STAN. ENCYCLOPEDIA PHIL. (Feb. 3, 2017), <https://plato.stanford.edu/entries/justep-coherence/>.

¹⁴⁵ Actually, not all members of the set of mutually coherent beliefs need be equal, in the sense of being as directly linked to as many other beliefs, or to as many diverse beliefs. Similarly, not all judicial case precedents need be directly linked to as many others, or as many diverse precedents, as others.

¹⁴⁶ See Olsson, *supra* note 144 (quoting W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (1970)).

this opposing coherentist approach, "what justifies our beliefs is ultimately the way in which they hang together or dovetail so as to produce a coherent set."¹⁴⁷ None is foundational, basic, or bedrock.

This analogy suggests that in order for a case to be unusually secure and unusually influential, as we might expect of a superprecedent, the case need not be more "foundational"¹⁴⁸ than other cases, or amount to judicial "bedrock."¹⁴⁹ Without foundational or bedrock status, a case might instead still be both directly and indirectly linked to a large number and variety of cases deemed to be of significance, in a network of overall collective validation.¹⁵⁰ While we might say that the networked superprecedent "supports" other cases, other cases may in turn crucially contribute to the creditability, vitality, influence, and persistence of the presumed superprecedent case.¹⁵¹

Coherentism thus allows us, by analogy, to view the problems of superprecedence quite differently. Merely for example, consider the controversy over whether *Roe* is or should be a superprecedent.¹⁵² A focus on whether *Roe* is "foundational" or "bedrock," as these terms are typically used,¹⁵³ is crucially misleading. *Roe* is obviously no more "foundational" than many other cases, in that is in the relevant sense itself crucially based on the foundation of prior cases, including *Griswold*¹⁵⁴ and the more equal protection-oriented contraception case of *Eisenstadt v. Baird*.¹⁵⁵ Arguably, without *Griswold*, *Eisenstadt*, and other cases, *Roe* would not have then been decided as it was. But if we say that *Eisenstadt* was foundational with respect to *Roe*, we clearly must also say that *Griswold* was in turn foundational to *Eisenstadt*.¹⁵⁶ Of all these cases, we might find *Griswold*, perhaps, to be the most structurally important. But then, similarly,

¹⁴⁷ *Id.*; see also Laurence Bonjour, *The Coherence Theory of Empirical Knowledge*, 30 PHIL. STUD. 281 (1976); Michael R. DePaul, *Two Conceptions of Coherence Methods in Ethics*, 96 MIND 463 (1987); Michael Williams, *Coherence, Justification, and Truth*, 34 REV. METAPHYSICS 243 (1980). In legal contexts, see, for example, Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375 (1999); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992); R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1991) (discussing the use of foundationalism and coherentism in American constitutional law).

¹⁴⁸ See *supra* note 140 and accompanying text.

¹⁴⁹ See *supra* note 142 and accompanying text.

¹⁵⁰ See *supra* notes 144–148 and accompanying text.

¹⁵¹ *Id.*

¹⁵² See *supra* note 132.

¹⁵³ See *supra* note 143.

¹⁵⁴ As noted in *Roe v. Wade*, 410 U.S. 113, 129 (1973).

¹⁵⁵ 405 U.S. 438 (1972).

¹⁵⁶ See *id.* at 445–46.

we must say that *Griswold* was constructed on the “foundations” of numerous privacy-related cases.¹⁵⁷

If *Roe* is not foundational because it rests on the layered foundations of supporting cases, and cannot therefore be a superprecedent, then we must also say that *Griswold*, as similarly resting on the foundation of other cases, also cannot be a superprecedent. Now, one might in the end want, for other reasons, to deny superprecedent status to either or both of *Roe* and *Griswold*. But for most practical purposes, it seems too easy, if not otherwise inadvisable, to deny superprecedent status to both *Roe* and *Griswold* even partially on this dubious basis.

In particular, if we choose to deny superprecedent status to, say, the *Griswold* case, we should have something to say not only about *Griswold*’s largely unchallenged status, but about *Griswold*’s dense network of strong mutual connectedness and mutual supportiveness¹⁵⁸ among the expanding range of obviously important substantive due process, privacy, and other sorts of cases. Reliance, in general, on images of foundations, or bedrock status, in order to determine superprecedent status is thus grossly misleading.

The second basic problem that plagues discussions of superprecedent status is the typical indifference, in such discussions, as to whether superprecedence is primarily a descriptive matter, or primarily a normative matter, or some alternative thereto.¹⁵⁹ There is, clearly, often an important difference between the processes of describing and of normatively evaluating.¹⁶⁰

We can easily imagine someone who argues that a personally preferred case is, or should be, recognized as a superprecedent, where that person’s motivation is purely strategic or political in nature. The logic in so arguing would be that the case’s being widely recognized as a superprecedent would further enhance the prestige and legitimacy of the case and reduce the chances of the case’s being further challenged, let alone overruled. On such an agenda, the point

¹⁵⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965). *Griswold* relies on, in particular, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), also authored by Justice Douglas.

¹⁵⁸ For an exploration of the related phenomenon of “cumulative case” arguments, see R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1 (2002).

¹⁵⁹ As of September 11, 2019, a Westlaw search indicates that *Griswold* has been cited by more than 1,663 federal court cases, in various subject matter areas, including, for example, the housing ordinance occupancy limits case of *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977), and the public school library book free speech case of *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 866 (1982).

¹⁶⁰ As discussed in the context of the classic is-ought distinction. For background, see, classically, 2 DAVID HUME, A TREATISE OF HUMAN NATURE, bk. III, pt. I, § 1 (1817). For merely one account among many, see Max Black, *The Gap Between “Is” and “Should”*, 73 PHIL. REV. 165 (1964). More critically, see John R. Searle, *How to Derive “Ought” From “Is”*, 73 PHIL. REV. 43 (1964).

of a recognized superprecedent status would be to immediately and inescapably enhance the status and protection afforded to a preferred case precedent.

This political strategy might be less helpful, however, if we think of a superprecedent instead in primarily descriptive terms. Suppose, for the sake of simplicity, we think of a superprecedent merely in terms of the extraordinary persistence of its influence. Persistence and influence may, possibly, in the end be somehow associated with positive normative value. But one would need some separate, additional theory establishing that association. The bad can persist. The bad can be influential. In the meantime, we would have to acknowledge that important, but morally unjustified, judicial precedents have also held sway for many decades.¹⁶¹ A case could be influential for good or for ill. The broad question is thus how much, if any, normative luster should be built into the very idea of a superprecedent.

The very rough analogy to this judicial problem from philosophy is to the philosophical distinction between evaluatively “thin” concepts and evaluatively “thick” concepts.¹⁶² The important idea for our purposes is that some concepts seem to straddle a presumed line between their function in merely describing and their function in normatively evaluating, thus partaking of both descriptive and normative elements. Consider, for example, the idea that someone has acted “courageously.”¹⁶³ We might initially think of this as largely descriptive of what someone has done. We think that we can “see” courage in action. But to describe an act as courageous also seems inescapably to convey an evaluative judgment of approval or admiration, at least in some respect or to some degree.¹⁶⁴

The problem in this respect with superprecedence status is that little attention has been paid to whether, or how much, the idea of a superprecedent is like that of acting courageously. Are we to first settle upon whether a given case is a superprecedent, and only then begin the normative task of deciding whether to strongly and distinctly respect the superprecedent in question? Or are we to instead believe that once we have settled upon a definition of “superprecedent,” and properly classified some case thereunder, most of the crucial normative

¹⁶¹ As merely one example, note that *Plessy v. Ferguson*, 163 U.S. 537 (1896), remained the law of the land, even as to public schools, for 58 years until *Brown v. Board of Education*, 347 U.S. 483 (1954). See also *Whitney v. California*, 274 U.S. 357 (1927), overruled by *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chae Chen Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

¹⁶² See generally Michael Smith, *On the Nature and Significance of the Distinction Between Thick and Thin Ethical Concepts*, in THICK CONCEPTS 97 (Simon Kirchin ed., 2013); Simon Kirchin, *Thick Evaluation*, 128 MIND 954 (2017); Pekka Vayryen, *Thick Ethical Concepts*, STAN. ENCYCLOPEDIA PHIL. (Sept. 21, 2016), <https://plato.stanford.edu/entries/thick-ethical-concepts/>.

¹⁶³ See, e.g., Vayryen, *supra* note 162.

¹⁶⁴ This may partially explain why some of us are unwilling to describe as “courageous” an act in the service of what we deem an evil cause.

questions regarding the case itself¹⁶⁵ have thereby been already answered? Otherwise put, is the main jurisprudential and political struggle over what does or should count as a superprecedent, or does much of the crucial jurisprudential and political struggle remain to take place even after a particular case has been classified as a superprecedent?

The third and final crucial problem that plagues discussions of superprecedent status involves the typical indifference to, or neglect of, the wide range of possible judicial and other responses to a presumed superprecedent. Even an unanimously endorsed superprecedent may see important fluctuations over time in its “gravitational field” between lesser and greater influence on other cases and contexts. That a case remains a superprecedent tells us little about these important possibilities.

More important, though, is the lack of attention generally paid to the range of the possible critical responses to purported superprecedents. Unless we choose to define a superprecedent in such a fashion that it can never be subject to any future critique, we must attend to the fact that there is no unique single way to critically respond to an established precedent. Even the idea of “overruling” a precedent, super or otherwise, can take various forms, with varying effects.¹⁶⁶ It would only minimally overstate matters to say that every “overruling” of a case is unlike any other. Even a superprecedent could be overruled, while leaving the world much as it is.¹⁶⁷ But overruling a superprecedent might instead enshrine a diametrically opposed world-view,¹⁶⁸ or perhaps leave the future of the relevant law open, to one degree or another.¹⁶⁹

Of even greater significance, though, is that a superprecedent can be limited in any of various ways and degrees without being overruled. A superprecedent could thus be distinguished, “chipped away” at,¹⁷⁰ confined to its facts, somehow undermined, bypassed, occasionally ignored, conspicuously or

¹⁶⁵ If not also its proper reach, or extension, in practice.

¹⁶⁶ Thus, *Brown v. Board of Education* did not do to the *Plessy v. Ferguson* precedent what *Lawrence v. Texas* did to *Bowers v. Hardwick* in the area of sexual privacy. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003); Somin, *supra* note 49 (“Even in *Brown*, the Supreme Court did not overrule *Plessy*.”).

¹⁶⁷ Note the range of paradoxes explored in *supra* Part III.

¹⁶⁸ While *Bowers* was hardly at any point a superprecedent, note the degree of value inversion implied by its rejection in *Lawrence*. See *supra* text accompanying note 166. Consider also the remarkable “flipping” of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), on the question of a public-school student’s constitutional right to not salute the flag.

¹⁶⁹ Thus, *Brown* itself, on *Brown*’s own reasoning, does not tell us much about the constitutional viability of *Plessy*’s separate but equal doctrine outside the context of education. See Somin, *supra* note 50. But see *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (tersely applying the *Brown* outcome to municipal golf courses).

¹⁷⁰ See Solove, *supra* note 71 (distinguishing a strategy of “chipping away” at a superprecedent from seeking its radical reversal).

inconspicuously not invoked in a later context,¹⁷¹ or variously adjusted¹⁷² at the margins.¹⁷³ And there is as yet no clear theory as to when any of these more incremental changes may be appropriate with respect to a presumably continuing superprecedent. Relatedly, there is also no reasonably clear theory as to when a case's superprecedent status is or should be lost as a result, cumulative or otherwise, of any of the various limiting responses to such cases.¹⁷⁴

¹⁷¹ Thus, the well-known and widely discussed free speech "fighting words" case of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), while never overruled, has apparently also never formed the basis of any later Supreme Court holding. For criticism of *Chaplinsky*, see, for example, Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 68 MARQ. L. REV. 443 (2004).

¹⁷² Consider how the iconic public-school student free speech case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), has been gradually "hedged about" by various limitations, as in *Bethel School District v. Fraser*, 478 U.S. 675 (1986) (lewd, vulgar, indecent, or patently offensive student speech); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (curricular speech arguably endorsed by the school); and *Morse v. Frederick*, 551 U.S. 393 (2007) (student speech arguably advocating illegal drug use).

¹⁷³ If *Roe* is considered a superprecedent, we might judge *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to have meaningfully modified or adjusted *Roe*, while leaving a "core" component of *Roe* intact. For further such adjustment or clarification, see *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (refining *Casey* on questions of undue burdens and substantial obstacles to abortion access). See also, e.g., *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018). For discussion of possible legal consequences of an overturning of *Roe*, see Ann Althouse, *Stepping Out of Professor Fallon's Puzzle Box: A Response to "If Roe Were Overruled"*, 51 ST. LOUIS L.J. 761 (2007); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS L.J. 611 (2007). For recent surveys of possible state-level responses, see Joy Fox et al., *What Could Happen If Roe v. Wade Gets Struck Down?*, WASH. POST (Nov. 2, 2018), <https://www.washingtonpost.com/graphics/2018/national/abortion-rights-supreme-court/>; Evan Halper, *If a Reshaped Supreme Court Tosses Abortion Decisions Back to States, Several Would Move Fast to Outlaw the Procedures*, L.A. TIMES (June 28, 2018, 5:08 PM), <https://www.latimes.com/politics/la-na-pol-abortion-20180628-story.html>; *One-Third of the 1,193 State Abortion Restrictions Since Roe v. Wade Have Been Enacted in the Past Seven Years*, GUTTMACHER INST. (Jan. 2, 2018), <https://www.guttmacher.org/infographic/2018/trends-state-abortion-restrictions-2017>.

¹⁷⁴ One general, if also rather vague, possibility would be that at least some superprecedents have the important role of symbolically expressing who or what we are, or what we aspire to collectively, as a people. We can certainly imagine, for example, someone pointing to *Brown* and saying that this is, in one respect, who or what we are, and that *Plessy v. Ferguson* is "not who we are." A problem here is that in some cases, declaring that this is "not who we are" may impliedly concede that this is indeed who we too often are. See Tim Dowling, *"This Is Not Who We Are" Is American for: "This Is Sort of Who We Are"*, GUARDIAN (London) (Mar. 10, 2015, 4:40 PM), <https://www.theguardian.com/commentisfree/2015/mar/10/this-is-not-who-we-are-american-lindsay-graham>. More crucially, declarations as to who we are, or who we are not, may be question-begging, preemptive of (further) discussion, or an elevation of established tradition over criticality or the pursuit of more objective truth. See, e.g., Gerard V. Bradley, *Truth and Politics: A Symposium on Peter Simpson's Political Illiberalism: A Defense of Freedom*, 62 AM. J. JURIS. 1, 1 (2017).

V. CONCLUSION

The idea of a judicial superprecedent has assumed an important role in constitutional theory and in judicial politics. Unfortunately, there remains an unusual degree of uncertainty, dispute, and sheer unresolved conflict over how a superprecedent should be characterized. As it turns out, paradoxically, one or more of the mostly commonly proposed superprecedent cases are either technically not overruleable,¹⁷⁵ or remarkably “buoyant” in that any overruling would inevitably generate irresistible systemic pressures to reassert something like the prior status quo,¹⁷⁶ or more important for symbolic or expressive purposes than for any actual impact on the broader culture,¹⁷⁷ or, finally, may represent viewpoints, as to their actual holding, with whom few persons would disagree.¹⁷⁸

Beyond the variety of these paradoxes associated with superprecedence, however, lie an array of unresolved crucial problems. In particular, the idea of a superprecedent has been unfortunately tied to the simultaneously helpful but crucially misleading metaphor of a “foundational” or “bedrock” judicial case.¹⁷⁹ Second, there has been little progress on the practically important question of whether superprecedence is primarily a descriptive concept, or primarily a normative or evaluative concept, or some other interesting hybrid.¹⁸⁰ And finally, little attention has been paid to the important variety of ways in which a case, including a presumed superprecedent, could be meaningfully limited or constrained in its influence without being in any sense overruled.¹⁸¹

Relatedly, one might try to think of superprecedents as, most prominently, what are called “constitutive” rules, as distinct from “regulative rules.” See JOHN SEARLE, *SPEECH ACTS* 33–34, 50 (1969); Christopher Cherry, *Regulative Rules and Constitutive Rules*, 23 *PHIL. Q.* 301, 302 (1973). Very roughly, constitutive rules might establish (and then regulate) an institution, whereas a regulative rule would merely govern a pre-existing practice. Rights, as well, might also be thought of as either constitutive or regulative. See Eric J. Mitnick, *Constitutive Rights*, 20 *OXFORD J. LEGAL STUD.* 185, 185–86 (2000); Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 *J. CONST. L.* 399 (2008). It would seem, however, that many candidates for judicial superprecedent status will be difficult to classify as either primarily “constitutive,” in any sense, or as primarily “regulative.” And a heavily regulative, or de-regulative, case precedent could presumably also speak to who we are, or (ought to) aspire to be as a people.

¹⁷⁵ See *supra* notes 96–98 and accompanying text.

¹⁷⁶ See *supra* notes 101–110 and accompanying text.

¹⁷⁷ See *supra* notes 111–115 and accompanying text.

¹⁷⁸ See *supra* notes 117–136 and accompanying text.

¹⁷⁹ See *supra* notes 140–158 and accompanying text.

¹⁸⁰ See *supra* notes 160–165 and accompanying text.

¹⁸¹ See *supra* notes 166–174 and accompanying text.

Until at least some of these important problems are satisfactorily addressed, it seems best to downplay, and thus to broadly subordinate and downgrade, any reliance on the idea of a judicial superprecedent.